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IN THE SUPREME COURT OF THE UNITED TATES.

No. 147.

October Term, 1920.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
v.
WILLIAM E. ROGERS, *et al.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The statement appearing in brief of the United States with reference to the course of the proceedings and the substance of the incomplete transcript of record is substantially correct. No pretense is made of bringing up the whole record but the transcript includes only such things as within the apparent view of the United States, are necessary to affirmatively show errors relied on. In short, in line with the theory upon which this case was tried in the lower court, only so much of the record as was necessary to raise the broad general question as to the legality of adding damages in the nature of interest to the

award of the commissioners, is included in the transcript.

The theory of the plaintiff throughout the course of the trial of this case and on the appeal thereof, appears from the transcript both of the case at bar and Number 148, page 3, (paragraph 2 of agreed statement of facts) viz; that by agreement of the parties, the jury were instructed that the question of whether or not the defendant was entitled to interest on the award, was a matter of law for the determination of the Court.

Within the view of defendant in error, the important and governing facts in this case are: (1) that the land was taken and appropriated by the government on April 19, 1912; (2) that since that time the government has used the land as a reservoir site, to the entire exclusion of defendant in error; (3) that the petition for determination of assessment of damages or compensation was not filed until January 18, 1915; (4) that the compensation or damages fixed by the Commissioners was the value of the land on April 19, 1912, and did not include anything by way of interest or otherwise, as damages or additional compensation by reason of time intervening between the taking and the payment of the value of the land in court; (5) that the compensation to which defendant in error was conceded to be entitled was not fixed until the order confirming the Commissioners' report was filed.

Plaintiff in error, in the statement in its brief, page 5, complains that nothing appears in the record from which it can be learned that defendant in error in pleadings or at trial before the Commissioners, or by application to the court to

instruct the Commissioners, brought forward (a) a demand that interest be added; (b) a claim that any actual damage had been sustained because of deprivation of use, and (c) any evidence to establish the fact or quantum of such actual damage. In the first place, these matters were not preserved for appeal by any objection or exception in the lower court, and in fact are entirely contrary to the theory adopted by the plaintiff in error in the lower court, as already pointed out. In the second place, these matters were not covered either by the assignments of error or brief before the Circuit Court of Appeals. Finally, it does not lie in the mouth of the plaintiff in error to complain that the record fails to disclose these facts, inasmuch as the record brought up is concededly abbreviated and incomplete, intended only to review the simple question as to the legality of damages by way of interest on account of the time intervening between the date of the taking and the payment of the value of the land on such date into court. In this connection it is submitted that under the state of the record this court must necessarily presume that were the entire record of the cause before it, all facts and pleadings necessary to support the judgment were before the trial court, leaving the question at issue solely one of substantive law.

SPECIFICATIONS OF ERRORS.

In this court plaintiff in error relies on three specifications of errors, which are in substance:

1. That damages by way of interest are not properly and legally allowable as a right or

as a part of the just compensation guaranteed by the Constitution.

2. That the compensation allowable by way of added damages for deprivation of use and occupation is a matter only for consideration in the light of the prevailing conditions, and

3. That defendant in error did not demand interest either in the pleadings or in lieu thereof damages for use and occupation.

By reference to the transcript of record it appears that the assignments of error urged before the Circuit Court of Appeals were in substance that the trial court erred in awarding interest to the date of deposit of awards, for the reason that interest cannot properly be allowable in a condemnation case against the United States (1) for any period prior to date of final judgment, (2) for any period prior to date of the order of court placing the United States in possession, and (3) for the reason there is no authority of law for allowing interest at six per cent on judgments against the United States.

Comparing these latter specifications of error with those urged in this court, it at once appears that specifications number 2 and 3 urged in this court were not urged or relied upon in the Circuit Court of Appeals.

It also appears that the transcript of record brought to this court is entirely insufficient to predicate specifications 2 and 3 upon. As previously stated, under the abbreviated form of the record this court must necessarily presume that all of the things claimed to be lacking within these specifications were done, assuming that

they were necessary as a matter of law, which is not conceded.

ARGUMENT.

I.

CERTAIN INCIDENTAL QUESTIONS.

Certain incidental and minor questions are raised in the brief of the plaintiff in error, which as a preliminary, will be considered under one head:

(a) *Assignments of Error not urged in the Circuit Court of Appeals are not permissible in the United States Supreme Court.*

As already pointed out in the preceding statement plaintiff in error's assignments of error in this court numbered 2 and 3 were not urged in either the trial court or the Circuit Court of Appeals. This is not permissible.

AUTHORITIES.

Pine River Logging & Improvement Co. vs. U. S. 186 U. S. 279; 22 Supreme Court 922; Union Pacific Railway Co. vs. Chicago R. Co., 163 U. S. 564; 16 Supreme Court 1173; Keyser vs. Phitz 133 U. S. 138.

The reason and necessity for this rule is particularly apparent in this case. Had it been urged in the Circuit Court of Appeals that damages for use and occupation could only be assessed in the light of prevailing conditions, or that the defendants in error had failed to demand interest in their pleadings, the defendant in error could by suggestion of diminution of the record brought before that court the parts of the

record necessary for the court in determining such questions. However, this was not done, and certainly at this late date the plaintiff in error is not entitled to raise the question under the rule above quoted. Stated in another way, these assignments of error numbered 2 and 3 in this court constitute a change of the theory followed by the plaintiff in error in the trial court of the Circuit Court of Appeals. This is not permissible. See 4 Corpus Juris, 701, and cases cited in note 49.

(*b*) *Presumptions.*

The attention of the court has already been called to the abbreviated form of the record in this cause. Under these circumstances this court should indulge in all reasonable presumptions in favor of the correctness of the order from which this appeal is prosecuted. The general rule in this connection as stated in 4 Corpus Juris 735, is:

> "Presumptions favorable to the judgment, order or decree appealed from are properly indulged in a case where the record on appeal is abbreviated, defective, imperfect or incomplete, even though it is provided by statute that appellant need bring up on appeal, only a partial record of the proceedings. Where the determination of a question presented for review depends on evidence and the record on appeal does not show or purport to show all the evidence pertaining to it in the manner required by the practice in the particular jurisdiction, it will be presumed that the evidence was sufficient to sustain the ruling or the

> action of the court, or the action of the jury in case the question raised is the sufficiency of the evidence to sustain the verdict."

Even though this court might conclude that the plaintiff in error was entitled to urge its specifications or assignments numbered 2 and 3 in this court, in the light of the foregoing rule and in view of the state of the record, this court must necessarily presume, as was the case, that the trial court had before it evidence as to the prevailing conditions and that proper and seasonable demand was made for interest.

In this same connection the complaint that no interest was demanded in the pleadings can be briefly referred to. As to this question, it is submitted that in a condemnation case such as this no pleading other than one raising the general question as to the right of the government to take the land is either permissible or contemplated by the statute. (Ruling Case Law Vol. 10—Page 212 p 181). The power of eminent domain is of necessity in the sovereign and is only limited or conditioned by the constitutional provisions requiring due process of law and just compensation. In the case at bar, not only the power and authority of the United States to take the land was conceded, but it was alleged in the petition, and as appears from the agreed statement of facts and other parts of the record, it was agreed by the parties that the land in question was actually taken on April 19, 1912. Under these circumstances, the only question in the case was the quantum or amount of compensation or damages due the defendant. The government, in its peti-

tion, set forth that it was ready, able and willing to pay such just compensation when it was determined by the designated tribunal. The just compensation to which defendant was entitled and which plaintiff offered to give is guaranteed by the Constitution, and no demand was necessary on the part of the defendant in order to secure it. The rule is well stated in the case of Levee Commissioners vs. Dancy, 65 Miss. 335, 3 Southern 568, in which the court said:

> "No act which devolved on the owner the duty of initiating proceedings for compensation for his property, as the condition of his obtaining it, is allowable. He can not be required to become an actor under the penalty of losing his property and due compensation for it. if he shall not. He may enjoy his own, secure under constitutional guarantee, until an inquest by public authority determines that it is required for public use, and fixes the price to be paid him for the sale of it, etc."

The New Mexico statute does not require, authorize, and apparently does not contemplate any pleading whatsoever on the part of the defendant. Even if the owner files no pleading, and in fact makes no appearance whatever, it is the duty of the court to see that just compensation is provided before the property is appropriated, which affirmatively appears in the transcript of record in the Rogers Case, by reason of the fact that many awards were made to defendants who never appeared.

Furthermore, the New Mexico statute* (section 2108, 1915 code) does not provide for the owner to initiate any proceedings for payment of property appropriated under the power of eminent domain, but only provides for recovering compensation for damages, which we take it means damages to property not taken as incidental to property taken.

(c) *Claim of lack of evidence as to the value of the loss of possession.*

Claim is made in brief for the United States that there is no evidence as to the value of the loss of possession. This statement should be qualified to the extent of saying that no evidence appears in the record before this court as to the value of the loss of possession.

For the purpose of argument, only, counsel state that at the time of the hearing of the question as to the amount of damages, considerable evidence was heard both by the commissioners in the Rogers case and by the jury and court in the Highsmith case as to the value of the loss of possession. None of this being before this court in the claim made by the Government, very plainly can not properly be urged.

II.

DEFINITION OF THE TERM "JUST COMPENSATION."

The fifth amendment to the constitution of the

*SEC. 2108. ACTION BY OWNER.

In case property is to be, will be or has been by any corporation damaged for public use, any person interested may have such damages ascertained. The proceedings for ascertaining and paying such damages shall be the same as are or may be provided by law for assessing damages, which owners of land may sustain in consequence of its appropriation for railroad purposes.

United States requires that private property shall not be taken for public use without just compensation. The power of eminent domain is inherently in the government, without any constitutional, statutory or legislative provision. The fifth amendment is merely a limitation or restriction upon the sovereign power of eminent domain. It provides simply that the sovereign in exercising the power must make just compensation to the party injured by such exercise.

A preliminary inquiry, therefore, is first as to the meaning in general of the term "just compensation" and second the scope, force and effect of such term as used in the 5th amendment.

In 20 Corpus Juris 641 and 642 is found the following definition:

> "The term 'compensation' . . . means a full indemnity or remuneration for the loss sustained by the owner of property taken or injured, and such constitutional requirement is not satisfied by a mere colorable compliance. 'Compensation' and 'damages' are practically equivalent terms." (Citing Bauman vs. Ross, 167 U. S. 548.)

"Just compensation should be determined on equitable principles and should be such as to put the owner in as good condition pecuniarily as he would have been if the property had not been taken." See 20 Corpus Juris 642 (citing U. S. vs. Rogers, 257 Federal 397; U. S. vs. Nahant, 153 Federal 520.)

As to the force, effect and scope of the constitutional provision for just compensation, the

courts have apparently uniformly adhered to the view that it guarantees to the owner of property that in the event he is deprived of his property by the sovereign, he will be paid the damages accruing to him on account of such deprivation.

For example in the case, in re Rugheimer, 36 Federal 369, the court said:

> "In this act (referring to the act authorizing condemnation), Congress has empowered certain public officials who may thereto be specially authorized to put in operation the right of eminent domain. It requires this right to be exercised by judicial proceedings in the district or circuit courts of the United States. These courts in directing and conducting these proceedings, mindful of the constitutional obligations must see to it that the process of condemnation be not awarded unless full compensation is provided."

Again in the same case it was said:

> "The act of 1888 must be read in *pari materia* with the constitution. The term 'condemnation' used in that act, must be construed to mean condemnation with just compensation. The machinery of the courts is employed to ascertain and secure such compensation."

The view which the courts have taken on the matter is well stated in Nichols on Eminent Domain, volume one, section 204, where the author says:

> "There has been much discussion of the question whether the obligation to

> make compensation is an essential part of the power of eminent domain, so that the taking of property for public use without compensation is not an exercise of eminent domain at all, or whether the obligation to make compensation is a condition imposed on the exercise of its power in all well ordered communities. The latter is now accepted as the sounder view." (Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685); (Weeks vs. Kress 194 Mass. 296-298; 80 N. E. 220).

And also the following quotation from section 208, volume one, Nichols on Eminent Domain, shows the modern trend of authority:

> "That just compensation to which an owner is entitled when his property is taken by eminent domain is regarded by law from the point of view of the owner and not of the condemning party. In other words, just compensation in the constitutional sense is what the owner has lost and not what the condemning party has gained." (Boston Chamber of Commerce vs. Boston 217 U. S. 189; U. S. vs. Chandler Dunbar Water Power Co. 229 U. S. 53.)

For authorities to the same effect see:

U. S. vs. Rauers, 70 Federal 748, *in re* Manderson, 51 Federal 501.

III.

IN CONDEMNATION PROCEEDINGS COMPENSATION IS DUE UPON THE DATE OF THE TAKING.

The question of whether or not defendants in

error in this case are justly and legally entitled to damages by way of interest upon the awards, will depend upon when the compensation awarded by the commissioners and the jury was due and payable.

The plaintiff pleaded apparently, the commissioners, the jury and the court found, and the parties stipulating as to the facts in this case, agreed that the lands in question were taken by the United States on April 19, 1912. On that date the defendant in error was entitled as a matter of strict constitutional right to the payment of the value of his lands so taken, for, as previously pointed out, the 5th amendment requiring just compensation where land is taken under the power of eminent domain, is a restriction and a limitation of the right of eminent domain, or, conversely, when the right of eminent domain is exercised, the right of compensation automatically follows:

A leading authority on this proposition is the case of Parks vs. Boston (Mass. 16 Pick 198) from which counsel quote the following excerpt found in section 436 in Nichols on Eminent Domain:

> "The true rule would be, as in the case of other purchases, that the price is due and ought to be paid at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder court should be called on the instant and on the spot the true rule of justice for the public would be, to pay the compensation with one hand whilst they applied the axe with the other; and this rule is departed from only because

> some time is necessary by the forms of law to conduct the inquiry; and this delay must be compensated by interest. But in other respects the damages must be appraised upon the same rule as they would have been upon the day of the taking."

IV.

AS A GENERAL RULE INTEREST IS ALLOWED FROM THE TIME COMPENSATION IS DUE AND AS ALMOST A UNIVERSAL RULE FROM THE TIME OF ACTUAL POSSESSION BY THE CONDEMNOR.

After an extended search of the decisions, both state and federal in the United States, upon the proposition of damages by way of interest on awards in condemnation proceedings, we believe that few cases if any can be found in which interest has been denied the claimant from the time actual possession has been invaded. It is the disposition of the courts justly and fairly to offset or pay the damages accruing to the party by reason of the time intervening between the date of the taking and the date of the payment, by the payment of damages in the way of interest. This has been found to be not only just and right, but the most convenient method of disposing of the question of just compensation where an adjudication is not had until after actual taking. These questions have come up in a good many cases where private corporations, usually railroad companies in emergency cases and otherwise, have taken possession of property and condemnation proceedings have been brought

afterwards at varying lengths of time. A private corporation taking possession of property in advance of condemnation proceedings, or without any such proceedings is regarded as a trespasser, but the United States Government is not a trespasser.

(*a*) Where property is taken in time of great emergency, for instance for war purposes, and

(*b*) Where there is congressional authority to take the property and a fund provided for the payment thereof.

This latter condition exists in this case. The authorities hold generally that the Government has a right to seize property where the necessities of the case, in the judgment of the executive department demand it, and in cases where Congress has authorized the taking and provided a fund for compensation, and the court's sanction the taking because the Government and the states are always considered responsible for their obligations, hence the compensation can be fixed at a later date:

> "Cooley's Constitutional Limitations, (7th Edition) 813;
> U. S. vs. O'Neil, 198 Federal 677;
> U. S. vs. National Bank, 250 Federal 299;
> Great Falls Mnfg. Co. vs. Garland, 25 Federal 521.

It would seem, therefore, that if there is any case in which the justice of a requirement that interest should be paid in cases of prior taking, it would be in cases in which the State or the Government is condemnor. A drastic rule might

be reserved to be applied against private corporations violating the law in such cases, but when the right of the Government is recognized to seize properties without any judicial proceedings whatever, it is essential that if the Government, through its officers, has determined that immediote possession of the property of interest to all of the people is necessary, the owners should be compensated for moneys withheld until the compensation can be ascertained. In order that the court might see how this question of interest is regarded from a standpoint of absolute justice in the various states of the Union, we call attention to a few of many cases holding the claimant entitled to interest:

In the case of Syracuse L. S. & N. R. Co. v. State, 161 N. Y. S. 477, it is said:

> "As hereinbefore stated, the assumed appropriation of all the parcels was made at the same time at which time the sub-station and transmission line were in station and transmission line were in full operation, or as the saying is, were going concerns. The claimant acquiesced in the attempted appropriation by the state, waiving all irregularities, dismantled its transmission line and yielded possession of its strip of land and rights of way to the state to be converted into a spoil bank. For the state to take advantage of its own mistake and succeed in compelling claimant to accept an award based upon the value of its property in January, 1912, would be gross injustice to the claimant. We think the claimant is entitled to the award of $559.43 with interest thereon from June 1, 1908."

In re Southern New England Ry. Co. (R. I.) 94 Atl. 738, the court said:

> "Under the Constitution private property can not be taken in the exercise of the right of eminent domain without just compensation. If the circumstances of the matter had permitted, the damages should have been paid at the time the claimant's property was taken from him. The ascertainment of the amount of his damages necessitated delay. When the amount of his damages are determined, in justice they must be regarded as due to him of the day when his property was taken, and he is entitled to interest for their detention from that time until the time of payment. That is the principle generally recognized by the authorities dealing with this question of interest."

The court held in Hayes v. Ry. Co. 64 La. 756:

> "Where the landowner is kept out of both the use of the money and the use of the land, he is entitled to what would be equivalent to 6 per cent interest upon the money . . . The assessment is to be reached through a computation. But from what date? The date of the commissioner's appraisement is not material. That appraisement, as we have seen, did not of itself give a right to interest, or anything equivalent thereto. The date, manifestly, from which computation is to be made, is the time of taking possession."

In Moll v. Sanitary District, 228 Ill. 635, the court said:

> "The plaintiff was deprived of his property without any compensation for the use thereof, from the time the defendant took possession until the final award fixing his damages. He could not accept the $6,000 deposited without waiving his appeal. If his appeal had been unsuccessful he would not have been entitled to interest, for he ought to have accepted the amount awarded. But the judgment in his favor on the appeal is conclusive of his right to reject the tender, and it is clear that he was entitled to interest upon the full value of the property taken by the defendant from the time the latter took possession."

In Alloway v. Nashville, 88 Tenn. 510, 8 L. R. A. 123, it is said:

> "Nevertheless, we have no hesitation, in holding upon general principles, that interest should have been allowed from the time of the appropriation of the property. From that time the original owner was deprived of the use and possession of the land taken. The liability of the city accrued to that date, though the amount thereof is not determined finally until long thereafter."

Upon this proposition the Massachusetts courts are frequently quoted because Massachusetts has frequently dealt with the question of interest in eminent domain proceedings. In the case of Old Colony R. R. v. Miller, 125 Mass. 3, the court said:

> "The right of the landowner to damages for land taken by a railroad corpora-

> tion is complete when the location is made. That act constitutes the taking. It is the law of the case by the exercise of the right of eminent domain at that time, for which the statute provides indemnity. The amount is then due, and if agreed upon between the parties must be then paid. If not agreed on, damages are assessed by a jury on the application of either party; but they are assessed as of the time of the location, and the jury may properly allow interest upon the amount ascertained as damages for the detention of the money from the time of the taking."

See following cases to the same effect:

> Chandler vs. Jamaica Pond Aqueduct Co. 125 Mass. 544;
> Phillips vs. South Park Commissioners, 119 Ill. 626, 10 N. E. 230.

The text writers have stated this proposition, regardless of statute, definitely and positively. Nichols on Eminent Domain, Sec. 216, we quote as follows:

> "The law is that when land is taken by eminent domain, or when it is injured in such a way as to create a constitutional right to damages, payment for the land thus affected should be coincident with the taking or injury, and if for any reason payment is postponed, the right to interest from the time that payment ought to have been made until it is actually made follows as a matter of strict constitutional right. . . When, however, the owner is not paid the compensation until after the taking or injury

> is complete, as is the practice in many states, either with or without sanction of law when land is taken, and in almost all of them when it is merely damaged, it is well settled that he is entitled to interest, or at least to its equivalent in the form of damages for the detention of his money."

Quoting further from this authority, we call the attention of the Court to the following, on page 653, Vol. 1, of said work:

> "There is one limit upon the function of the legislature to fix *punctum tempora* in the case of interest, it can not be later than the time of actual dispossession."

In other words, we take it that according to this authority, it is not within the power of the legislature to provide for depriving a party of the actual possession of his lands and deny him interest from the time of dispossession.

In the case of People ex rel Central Trust Co. v. Stillings, 121 N. Y. S. 13, it was said:

> "The theory of the law of condemnation is that payment for the land taken shall be coincident with the taking, and if for any reason payment is postponed, the right to interest from the time payment ought to have been made follows as a matter of strict constitutional right."

In the case of Reed v. Chicago, etc., Ry. Co., 25 Fed. 886, we have no less authority upon the question of interest than Mr. Justice Shiras, at that time Judge of the Circuit Court for the Northern District of Iowa. He states:

> "In cases wherein the company enters upon possession before the trial of the cause upon appeal, and the damages are increased, then the property owner is entitled to interest from the time of the possession taken until payment is made. . . . Under the facts of this case, the plaintiff is entitled to interest on the amount of the damages as ascertained by the verdict of the jury from the time the defendant took possession of the right-of-way over the plaintiff's lands up to the time the defendant pays the damages awarded plaintiff."

The United States contends in brief, that the statute of New Mexico as construed in the case of A. T. & S. F. Ry Co. vs. Richter, 20 New Mex. 278, 140 Pacific, 478, prescribed in effect that awards in condemnation cases shall bear interest at 6 per cent from the date of taking is a statute prescribing a rule of substantive law and hence is not binding upon the United States. We ask this Court to follow the New Mexico statute in this case, not because necessarily it can be regarded upon the question of interest as practical pleading forms and modes of procedure as set forth in the act of Congress of August 1, 1888 (25 statutes 357), but because it is a just and fair statute as interpreted by the Supreme Court of the State and as applied to the facts in this case and because it is in line with the decisions of nearly all of the states in the Union. To be sure, the United States courts are not compelled to follow the statutes of the various states, nor to be at the mercy of state legislatures, but as stated by Mr. Justice Adams in the case of the United States vs. Sargent, 162 Federal, 81:

> "When these statutes and decisions are just and right and are applicable, they will be adopted."

This same idea was adopted substantially by the Circuit Court of Appeals in the case at bar.

There is no general condemnation statute in the United States but the rule has been apparently to direct in the statutes authorizing condemnation by the Government, that 'the proceedings shall be carried on in conformity to the state statutes. The constitutionality of this form of United States Statute was first called into question in the case of Jones vs. United States, 48 Wisconsin, 385, which was later affirmed by the United States Supreme Court in 109 U. S. 513.

An act of Congress, March 3, 1875, provided that "whenever, in the prosecution and maintenance of the improvement mentioned, it should become necessary or proper, in the judgment of the secretary of war, to take possession of any lands, or the right of way over any lands, for canals or cut-offs, or to use any earth, quarries, or other material adjacent to the line of improvement and needful for its prosecution or maintenance, the officers in charge of the works might, in the name of the United States, take possession of and use the same after having first paid, or secured to be paid, the value thereof, 'which may have been ascertained in the mode provided by the laws of the State' wherein the property lay."

In affirming this case the United States Supreme Court through Mr. Justice Field said among other things:

"The use of the courts of the state in applying the rules of naturalization prescribed by Congress, the exercise at one time by state justices of the peace of the power of committing magistrates for violations of federal law, and the use of state penitentiaries for the confinement of convicts under such laws, are instances of the employment of state tribunals and state institutions in the execution of powers of the General Government. At different times, various duties have been imposed by Acts of Congress on state tribunals; they have been invested with jurisdiction in civil suits and over complaints and prosecutions for fines, penalties and forfeitures arising under laws of the United States. (1 Kent 400.) And though the jurisdiction thus conferred could not be enforced against the consent of the States; yet, when its exercise was not incompatible with state duties, and the states made no objection to it, the decisions rendered by the state tribunals were upheld. Whatever question might arise as to such delegation of authority, we can see none where the inquiry relates to an incidental fact, not involving in its ascertainment the exercise of any sovereign attribute. Almost, if not quite from the first year of its existence, it has been the practice of the General Government when necessary to take private property for public uses, to resort to state boards and tribunals to ascertain the value of the property and hence the compensation to be made. (*Burt vs. Ins. Co.*, 106 *Mass.* 262.) In recent statutes such resort is expressly prescribed. For example, on the 3rd of March, 1879, an act was passed for improving a part of the Tennessee River, which provided that, whenever it became necessary to take private prop-

> erty, 'The price to be paid shall be determined and the title and jurisdiction procured in the manner prescribed by the laws of the State of Alabama.' And on the 14th of June, 1880, an Act was passed making an appropriation for constructing reservoirs on the head waters of the Mississippi, with a provision that 'Injuries occasioned to individuals by the overflow of their lands shall be ascertained and determined by agreement, or in accordance with the laws of Minnesota.' These are but examples of many instances of legislation where resort is had to local boards or tribunals to ascertain particular facts by which the General Government may be guided in its action. Whatever assent may be necessary to the validity of the proceedings against the United States, owing to their general immunity from process, is given by such legislation."

The apparent holding of this court in the case of United States vs. Jones is simply that by the passage of a statute prescribing the use of the state courts or laws for the purpose of ascertaining the just compensation guaranteed by the Constitution, the United States waives the immunity that it would otherwise have from being subjected either to the state courts or the state laws. Followed to its logical conclusion, therefore, the principle would seem to be that where this immunity is waived, the provision of the state law to the effect that the damages for the time intervening between an actual taking and a payment therefor should be measured by interest on the value of the land at the time of taking, is in effect consented to or adopted by the United

States as a proper and convenient method for the computation of such damage.

V.

IN CONDEMNATION PROCEEDINGS THE UNITED STATES MAY BE REQUIRED AS A PART OF THE JUST COMPENSATION UNDER THE CONSTITUTION TO PAY DAMAGES IN THE NATURE OF INTEREST.

There is no reason in law or absolute justice why any different rule should be applied relative to the payment of interest from the date of taking possession in the case when the United States takes the land than is applied in the case when a private corporation takes it. Considerable comment is made in the brief of the plaintiff in error on the case of United States v. Sargeant, 162 Fed. 81. A number of cases cited and relied upon in the brief of the plaintiff in error are disposed of by the court in the Sargeant case. We think the Court, in that case has laid down the principle, well supported by precedent in the federal courts, as we shall hereafter show, that the United States may be required in condemnation proceedings to pay interest, and that the courts are not precluded by the Statute, 177 Judicial code, which forbids the allowance of interest on claims against the United States, upon the ground, as stated by the court, that

> "There is a great difference between the prosecution of a claim or account against the United States by a person who pushes it and a proceeding of this kind instituted by the United States.

> This proceeding, instead of one to collect an account or claim against the United States, is a civil action, instituted by the United States against the owners of lands to take it from them. The land owners are not plaintiffs prosecuting a claim, but defendants resisting a proceeding to deprive them of what is theirs until a condition precedent is fulfilled."

The court does not hold, as seems to be considered by plaintiff in error, in its brief, that this court is bound upon the question of interest by the statutes of the various states, but it does hold that whenever it appears that interest is fairly and justly due and the payment thereof is supported by the laws of the state in which the question arises, this court will apply the rule and require the United States to pay interest.

> "The cases make a clear distinction in the application of the rule as between an action founded in tort and a claim for damages for land taken under the power of eminent domain. When the land is taken, the owner is deprived of the use of his property and should be compensated at once for the injury done. If payment be delayed, he has the prima facie right to claim damages for the delay." (Hoffman v. Philadelphia, 25 Pa. 1; also Water Commrs, 195 N. Y. 502).

The case of Monongahela Navigation Company v. U. S. cited in the Sargeant case, appears to counsel to announce the basic principle which underlies the right to interest in condemnation proceedings as against the U. S. or a private corporation. This case is referred to and quoted from

in Lewis on Eminent Domain (3rd Edition) Sec. 683, where the author says:

> "In the ascertainment of the just compensation to be made for property taken, the parties are entitled to an impartial tribunal and to an opportunity to appear and be heard before such tribunal. It follows, therefore, that the legislature can not fix the compensation, or determine in what it shall consist, or prescribe the rules or principles upon which it shall be computed. An act of Congress authorized the condemnation of a lock and dam belonging to the Monongahela Navigation Company and provided 'that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated.' In a proceeding under this act this proviso was disregarded and compensation was given for the franchise. The court says: 'By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial inquiry and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.'"

The Circuit Court in the case of U. S. v. Sargeant, in citing the case of Monongahela Nav. Co. v. U. S. supra, said:

> "Without holding that the requirement for the payment of interest is one of the 'modes of procedure' which by Section 2, Act of August 1, 1888, is made compulsory upon the courts of the United States, we are satisfied to conform to it as the only palpably fair and reasonable method of performing the indispensable condition to the fair right of eminent domain, viz: of making just compensation for the lands, as ascertained, at the time of taking. 'The time of taking' under the Minnesota statute, supra, is when payment is made for it. 'Just compensation' as of that time, must be made. Monongahela River Co. v. U. S. 148, U. S. 324, 341, 13 Supreme Court, 622, 27 Law. Ed. 463. It is better when possible, to act in harmony rather than in conflict with the established policy of the state."

Counsel indicate that the Sargeant case is to be distinguished from the case at bar in that, as one of the reasons, the court was willing to follow the Minnesota statute in order that "just compensation may be made to the condemnee." *A consideration of the case at bar, and a consideration of the Sargeant case* will, in our opinion, show that the case at bar has infinitely stronger claim for interest than was apparent in the Sargeant case. It does not appear in the Sargeant case that the United States had taken possession and had enjoyed the fruits, the rents and profits of the land, but the court considered the statute

of Minnesota requiring the payment of interest from the time the award was found by the commissioners, as just and fair, because the owners would not be responsible for delays ensuing in the payment of the compensation. Infinitely more just and fair is the case of these claimants in the case at bar, who have been deprived of the possession of their property, out of which the Government has been making profit during the time it seeks to escape the payment of interest, and since the decision of the case of A. T. & S. F. R. R. Co. v. Richter, above quoted from, by the Supreme Court of the State of New Mexico, the rule in New Mexico is just as strong as the statute of Minnesota, requiring payment of interest from the time of possession.

As stated above, we consider the most important holding in the Sargeant case to be that a condemnation proceeding is not a claim against the United States within the statute prohibiting the payment of interest on claims, and that, therefore, the courts are free to consider the justice, in all condemnation proceedings, of demands for interest.

The point is made that the United States are not required in condemnation proceedings to follow any statute, but might follow the common law rule, in which no interest would be allowed. This is the argument made by Judge Phillips in a dissenting opinion in the Sargeant case, and we take it that it needs no answer from us in view of the fact that the remaining two justices of the court, to-wit: Messrs. Sanborn and Adams, did not consider those reasons controlling.

We wish to submit that in nearly every in-

stance in which interest has been disallowed in condemnation proceedings against the United States that it is because the United States had not taken actual possession of the property, and we submit that in each and every case where interest has been disallowed, as we will hereafter show, if it had been shown that the Government had taken actual possession of the lands the ruling would have been different.

Take the case of *In re Post Office Site,* 210 *Fed.* 832, referred to on page 11 of the brief of the plaintiff in error. The court states its reason for disallowing interest as follows:

> "The owners have had the use of the property until the present time, and they are not entitled to the use of the land and interest also."

This is the case to which counsel refers when he remarks that it was decided after the decision in the Sargeant case. It has nothing whatever to do with the principle laid down in the Sargeant case. The decision does not deny but what interest may be allowed against the Government in a proper case. It states:

> "Assuming that these are final judgments, interest will not run against the United States."

In the case at bar we are not seeking to obtain interest upon final judgments, but to obtain interest on money due and withheld prior to judgment. That court, in the Post Office Site case, states further:

> "We know of no authority for the award of costs."

We wish to respectfully submit that the United States Supreme Court, in the very recent case of United States v. Cress heretofore cited in this brief, decision by Mr. Justice Pitney, 61 Law Ed. 746, succeeded in finding a rule to require the United States in condemnation proceeding to pay costs. See also U. S. v. Engeman 46 Fed. 898.

Take, for further illustration, the dissenting opinion of Judge Phillips in the Sargeant case:

> "The kernel of the ruling of the Supreme Court (referring to Shoemaker v. U. S. 147 U. S. 284) is that the reason for disallowing any interest anterior to the judgment of condemnation is that the 'amount was not fixed or ascertained until a confirmation of the report' and *that the retention of the possession of the property by the condemnee is equivalent to the interest.* (Italics our.) . . . Until the judgment of condemnation the Government is not required to pay anything, as the obligation to pay and the right to take and enter upon the property and the right of the property owner to demand payment are corelative and contemporaneous. Until that time the *possession* of the invaded property remains with the owner, and in condemnation or general common law, until judgment of condemnation there can be no default on the part of the Government as the basis for imposing interest."

In the Shoemaker case, the reason for disallowing interest is distinctly stated and differ-

entiates that case very sharply from the case at bar. The following is quoted from the opinion:

> "The fourteenth assignment charges the court with error in refusing to allow interest on the amounts assessed as the valuation for the lands selected for the Rock Creek Park. The argument shows that the interest claimed was for the time that elapsed between the initial proceedings and the payment of the money into court. The vice of this contention is in the assumption that the lands were actually withdrawn from the *possession* of their owners by the mere filing of the map."

In the case of Bauman v. Ross, referred to on page 11 of the brief of the plaintiff in error, it was sought to obtain compensation as for a taking against the United States simply because under a statute providing for condemning certain lands for a highway in the District of Columbia, a map or plat of the lands contemplated to be condemned had been filed of record, and of course the court held that this was not such a taking of possession as would entitle the claimants to interest from that date. The court said:

> "Under the constitution and by the express provision of Sec. 18 of this Act, the United States are not entitled to possession of the land until the damages have been assessed and actually paid. The payment of damages to the owner of the land and the vesting of the title in the United States are to be contemporaneous. The constitution does not require damages to be actually paid at any ear-

lier time, nor is the owner of the land entitled to interest pending proceedings."

No such equities appeared in behalf of the claimant in that case as appeared in the case at bar. The case of Carlyle vs. Cooper, cited by counsel, does not touch this case. It was a case in which the court refused to hold the Government for costs which would not necessarily be a part of the just compensation. In the Highbridge Lumber Company case, the court refused to hold the Government for damages adjacent to this town, stating that it was prosecuted in Kentucky, and there being no statute for condemnation proceedings, it was under the common law. In the case of Nahant vs. U. S., the court observed that no interest was allowable because it did not appear but what the town had not been disturbed in its possession during all of the proceedings. It is a very different case from the one here, and it has the exact distinction which we claim, to-wit: that the Government has been at all times in possession of our property and we are asking interest only from the time that possession was invaded.

In the case of the U. S. vs. O'Neal, the court held that the question of necessity for the taking was not regulated by state law, which, of course, is true, because the necessity for the taking is a matter resting with the Government only, and is not a part of the procedure to ascertain compensation.

The case of Kanakanui vs. U. S. throws no light upon this case. That is where the court refused to apply the provisions of an extraordinary

statute of Hawaii to the effect that if the petitioner dismissed his condemnation proceeding and abandoned his efforts at condemnation he should be liable for damages and costs to the condemnee.

To the same effect is the case of

Town of Hingham v. U. S. 161 *Fed.* 295. The opinion is by Mr. Justice Putnam. The court said:

> "As to the question of interest, we refer again to Parks v. Boston, which leads up to the other propositions which we need to consider, in that, at page 206 et seq., the opinion insists on, and reiterates and illustrates, the rule that the value of the land taken is to be estimated as of the time of taking. Such being the fact, it would seem to follow that the obligation to make compensation for the land arises prima facie as of the time of taking, so that, therefore, according to the ordinary rules, it would carry interest from that time. It is true that, under the provisions of many constitutions and also in accordance with the terms of the pleadings and judgment of condemnation in this case, title is not wholly divested out of the owner until payment is made; but, on fundamental principles, when the title does completely vest, it is as of the time when the taking occurred. In other words, the well-known rule thus explained in Parks v. Boston usually, in Massachusetts, determines the point as of which all the rights of the parties are ultimately fixed. There may be exceptional cases, as was pointed out by us in United States v. Nahant, 153 Fed. 520. . . . In United States v. Nahant, already re-

ferred to, we refused to apply so technical a rule, in view of the fact that the town remained in full enjoyment of the use of what was there taken by condemnation. . . . What is more peremptory are Edmands v. Boston, 108 Mass. 535, 551, and Norcross v. City of Cambridge, 166 Mass. 508, 44 N. E. 615, 33 L. R. A. 843, to the effect that, where a statute provides that damages shall not be paid until the land has been entered upon, and possession taken, without any provision for compensation for delay in payment, the ordinary rule as to interest does not apply, and interest is not payable until the money becomes due, and that the Constitution of Massachusetts permits this, unless the owner proves that he has been put to trouble or expense, or incurred loss of the use of his land, not considered in assessing the damages. There is no evidence here of anything of that nature; and therefore, for aught we can see, we must hold that the rulings of the District Court were correct."

The principle under discussion, that is, the allowance of interest against the United States in condemnation proceedings from the time of the taking of actual possession of the lands, was recently applied by Judge Clayton in the United States District Court of Alabama, in the case of

United States v. First National Bank, et al, 250 *Fed.* 299 (*Advance Sheet* 2. *Aug.* 29, 1918).

In this case the Government had taken possession of the property of the claimants for a training camp and had afterwards brought con-

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In this case the Government had taken possession of the property of the claimants for a training camp and had afterwards brought con-

demnation proceedings under the Alabama statutes. The Alabama statute does not provide for the payment of interest as applied in that case, but the authority is found in a decision of the Supreme Court of that State, just as the authority here is found in a decision of the Supreme Court of our State in Railway Co. v. Richter, above referred to. The state case is that of Jones v. Ry. Co., 70 Ala. 233, which is a well considered case and was evidently relied on by Judge Clayton in his instructions to the jury. The legal rate of interest in Alabama is eight per cent, and the court instructed the jury as follows:

> "The sole question for you to determine in each one of the cases is the value of the lands and the property at the time of the actual taking and occupation by the United States, together with interest at the rate of eight per cent per annum, the legal rate allowed on said sums so ascertained by you from the date of such actual taking and occupation."

The statute under which this proceeding was had was a war measure, but it contains the same language as the statute we now have under consideration, to-wit: August 1, 1888. The language in the statute of July 2, 1917, under which the Alabama decision was had, relative to such proceedings in the state in which the action is instituted, is as follows:

> "Such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property in the states wherein the proceedings may be instituted."

We wish to submit that we see no difference, in substance, in a provision that "the practice, pleadings, forms and modes of procedure" must conform to the state laws and in a provision that such proceedings must be "prosecuted" in accordance with such laws.

The latest case having a direct bearing on the question here at issue is that of U. S. vs. North American Transportation Co. decided by this court June 1, 1920, and referred to at pages 13 and 22 in the brief for the United States. That case involved a suit brought by the transportation company against the United States in the court of claims to recover the value of a mining claim taken and occupied by the Government. The transportation company claimed interest on the amount of their claim for the time intervening between the date of occupancy by the United States and the date of the entry of judgment. This court held that the plaintiff in that case could not recover interest in the face of section 177 of the Judicial Code which provides directly that no interest should be allowed on claims up to the time of the rendition of judgment by the court of claims. In support of their position the Transportation Company cited the case of the United States vs. Sargeant, the opinion of the Circuit Court of Appeals in the case at bar, and others heretofore referred to in this brief. This court however, distinguished their case, pointing out,

(a) That in each of the cases cited, the Federal statute had provided that the condemnation should be conducted in accordance with the laws of the state in which the land was situated, and under

the law of each state, interest was recoverable;

(b) That the conformity provisions could have no application to lands in Alaska, and

(c) That the conformity provisions could not affect proceedings brought in the court of claims.

This court apparently approved the theory upon which the Sargeant case and the case at bar were decided in the circuit court of appeals, saying:

> "The company argues that interest is allowed in condemnation proceedings, not qua interest for default or delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title. (See Klages v. Terminal Co. 160 Pa. 386, 28 Atl. 862), and that collection of an amount, measured by interest, is not prohibited either by the statute limiting the powers of the Court of Claims or by the common law rule which exempts the sovereign from liability to pay interest (United States v. New York, 160 U. S. 598, 16 Sup. Ct. 402, 40 L. Ed. 551). This may be the theory on which interest should be allowed in compensation proceedings; and it may be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in condemnation proceedings brought by the government. For as suggested in United States v. Sargeant, *supra*, such a proceeding is not a suit by the land owner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant and which the Government institutes an order to secure title to land. (Mason City & Ft. Dodge R.

R. Co. v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321; 51 L. Ed. 629). On the other hand this suit brought in the court of claims is a very different proceeding."

VI.

RENTS AND PROFITS NOT REGARDED AS PROPER MEASURE OF DAMAGES FOR DELAY IN PAYMENT OF JUST COMPENSATION.

Counsel for plaintiff in error has contended at length that the measure of damages for the delay in the payment of the just compensation which is established as of the date of the taking, should be measured by the rents and profits or the actual value of the use of the land, and the evidence should have been submitted and the findings returned by the Commissioners or the jury as to the value of such use. However, no case is cited by counsel to sustain such contention, and we state that after diligent effort upon our part none can be found. By reference to the authorities cited in subdivision IV it will be found that the almost universal rule in all of the states, as well as the rule heretobefore applied in the federal courts, has been to measure this compensation for delay by legal interest, and as a matter of law, when interest is recoverable the same may be added to the verdict as a matter of calculation by the court and included in the judgment. This is the rule established in *Reed v. Chicago, etc., R. Co.*, 25 Federal 886, and the cases are collected in a note to the case of *St. Louis, etc., R. Co. vs. Oliver*, 10 Annotated Cases 748.

The only case we have found in which rents and profits or the value of the actual use of lands has been considered in condemnation proceedings is where the condemnor wishes to offset such use as the condemnee might have had of his lands after the supposed taking against the interest allowable by the general rule.

Lewis on Eminent Domain, Vo. 2, 3rd Edition, Section 705, and cases cited under notes 92.
Sutherland on Damages, 4th Edition, Vol. 1, Section 336.

It is submitted that no such rule could obtain here because it appears from the very allegations of the Government's petition in condemnation that the taking was completed on the 19th day of April, 1912; that the Government "flooded and thereby appropriated" the said lands. Therefore there was no "use" after said period in the said lands to the owner, and if there had been under the rule laid in *Sutherland on Damages*, above cited, the burden is upon the condemnor to show such value.

Furthermore, such rule can not be applied in this case because the theory of the petition, and in fact the theory upon which the case was tried in the lower court, was and is that the Government to all intents and purposes became the absolute owner of the lands on April 19, 1912, and nothing remained thereafter but to obtain the naked legal title upon the payment of the compensation, and any rents and profits accruing after that date would not belong to the owner.

The rule heretofore adopted by the Circuit

Court of Appeals in the Sargeant case and in the instant cases upon the whole is not only just but uniform and certain. The rule contended for by counsel would result in great uncertainty and speculation. In no case would the Government authorities know what compensation they might be required to pay in case the necessities of government required an appropriation in advance of condemnation proceedings. Rental value, to be sure, might be more or less certain, but where there is no rental value it would become a contest between the Government and the owner as to what uses the land would or could have been put to, and the value of such uses. In considering the just compensation to which an owner is entitled, and in establishing the value of the land at a different time for such purpose, the productive value of the land or the value to its owner based on the income as able to be derived from his use of the land is not the measure of compensation and not material, except so far as it throws light upon the market value.

10 *Ruling Case Law, Sec.* 112, *and cases cited under Note* 4.

Respectfully submitted,

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